In the Supreme Court of the United States.

OCTOBER TERM, 1908.

DENNIS W. MULLAN, APPELLANT,
v.
THE UNITED STATES. } No. 82.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The appellant in this case is a commander on the retired list of the United States Navy. While holding the same rank upon the active list of the navy, he served from July, 1896, to March 7, 1897, as commandant of the navy-yard at Pensacola, Fla. During his service at said post he learned that certain charges of misconduct had been preferred against him to the Secretary of the Navy and, desiring to have them investigated, he applied to the Navy Department for a court of inquiry. In compliance with his request a court of inquiry was ordered by the Secretary of the Navy, which convened in March, 1897, at the navy-yard at Pensacola,

for the purpose of inquiring into Commander Mullan's conduct "as an officer and gentleman during the time he served as commandant of said navy-yard, from on or about July 3 until on or about March 2, 1897."

The appellant was represented by counsel at the court of inquiry, and after a thorough and impartial investigation, during which 49 witnesses were examined, the court submitted its report to the Secretary of the Navy with the testimony produced before it, from which, among other things, it appeared that upon various occasions while in the city of Pensacola, and while on duty as commandant of the navy-yard at that place, Commander Mullan was in an intoxicated condition. The findings of the court, after a hearing by the appellant and his counsel, were duly approved by the Secretary of the Navy.

Appellant at the time of this report was subject to an early examination for promotion to the grade of captain, and in view of the fact that certain provisions of law relating to the procedure of boards of promotion require that if it shall appear that an officer is unable, by reason of drunkenness or any cause arising out of his own misconduct, to perform at sea the duty of the position to which it is proposed to promote him, he shall not be placed on the retired list of the navy, but discharged from the service with not more than one year's pay. For the purpose, therefore, of having the unfavorable finding in the report of the court of inquiry further investigated, appellant addressed a letter to the Secretary of the

Navy on May 19, 1897, in which he requested that a court-martial be convened to try such charges as might be formulated from the findings of the court of inquiry, in order that the matter be "investigated and passed upon by the highest tribunal known to military law."

To this request the Secretary of the Navy replied, on May 25, 1897, and after reciting the difficulties in connection with assembling a suitable court at a station so distant as Pensacola and of calling the witnesses together, denied his application, but offered to convene a general court-martial at the navy-yard at Washington, D. C., for his trial upon such portions of the findings of the court of inquiry as he (the Secretary) should deem proper to charge against him "provided the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence."

After further correspondence on the subject, fully set forth in the record, it was agreed that the findings of fact of the court of inquiry, the action of the Navy Department thereon, and the memorandum of the Judge-Advocate-General should not be sent to the court-martial, but that only the evidence taken before the court of inquiry should be transmitted. Appellant, by letter dated June 19, 1897, informed the Secretary of the Navy that he acceded to the conditions as contemplated by the letter of the Secretary of the Navy, dated May 25, 1897, and requested the court-martial.

Thereupon, in accordance with such request, a general court-martial was ordered by the Secretary of the Navy, to convene at the navy-yard, Washington, D. C., to try the claimant upon certain charges and specifications selected from the report of the court of inquiry. The court was convened on June 15, 1897, Commander Mullan being represented by his attorneys, Messrs. McCammon & Hayden, and during its sessions on that and succeeding days, one new witness was examined and the depositions of the 49 witnesses examined before the court of inquiry were received and considered, in pursuance of the agreement between Commander Mullan and the Secretary of the Navy, no objections being offered by the appellant or his attorneys at the trial of the case to the evidence so introduced.

The charges upon which appellant was tried by the court-martial were "drunkenness" and "drunkenness while on duty." He was found guilty of both offenses and sentenced "to be dismissed from the United States naval service." The proceedings, findings, and sentence of the court were duly approved by the Secretary of the Navy on June 30, 1897, and submitted to the President with a recommendation that the sentence should be confirmed. The sentence was, however, by the President's order of July 6, 1897, mitigated and the claimant was sentenced "to be reduced in rank so that his name shall be placed at the foot of the commanders in the navy, and to be suspended from rank and duty on one-half of sea pay for the period of five years, during which time he shall retain his place at the foot of said list."

During his period of punishment appellant made frequent protests against the legality of the proceedings of the court-martial by which he was convicted, and on July 11, 1901, the unexpired period of the sentence was remitted by order of the President.

Appellant filed his petition in the Court of Claims to recover the difference between one-half "sea pay" and "waiting orders pay" from the time the proceedings of the court-martial were confirmed and the punishment mitigated by the President to the time the sentence was remitted by him, the amount claimed being $3,934.14. The court below dismissed the petition with an opinion, whereupon appellant made application for appeal to this court.

ARGUMENT.

THE ISSUES.

The questions raised are purely questions of law and appellant's contention may be briefly stated as follows:

First. That the sentence of the court-martial was invalid because the court had no jurisdiction to consider any charge against him involving either capital punishment or dismissal upon the ground that article 60 of section 1624 of the Revised Statutes prohibits courts-martial from considering the proceedings of courts of inquiry as evidence in cases involving capital punishment or dismissal of a commissioned officer; and that appellant's consent to the use of the evidence produced before the court of inquiry, when taken in

connection with article 60, limited the jurisdiction of the court-martial to the consideration of charges of less degree than dismissal.

Second. That the President had no power to change the sentence of the court-martial from dismissal to suspension with half sea-pay and loss of numbers, upon the ground that the change was not in mitigation, but in commutation of the sentence, and, as such, prohibited by article 54 of section 1624 of the Revised Statutes.

JURISDICTION OF THE COURT-MARTIAL.

At the time charges were filed with the Secretary of the Navy, and when the adverse report of the court of inquiry was made, appellant was subject to an early examination for promotion to the grade of captain. Confronting him, however, in his efforts for promotion were the following statutes:

Section 1447, Revised Statutes, which reads as follows:

> When the case of any officer has been acted upon by a board of naval surgeons and an examining board for promotion, as provided in chapter four of this title, and he shall not have been recommended for promotion by both of the said boards, he shall be placed upon retired list.

The act of August 5, 1882 (22 Stat. 286), providing in part as follows:

> That whenever on inquiry had pursuant to law, concerning the fitness of an officer of the navy for promotion, it shall appear that such

> officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired list of the navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay.

The necessity for a clear record was evidently apparent to appellant, and explains the urgency with which he pressed his request for a court-martial. The court of inquiry had been ordered at appellant's urgent request, but, as has been seen, the Secretary of the Navy was unwilling to hold a court-martial at Pensacola owing to the inconvenience set forth. He did, however, on the conditions heretofore named consent to convene a general court-martial at the Washington Navy-Yard. The conditions attached to the convening of this court-martial were deemed necessary in order to meet the requirements of article 60, section 1624, Revised Statutes, which provides as follows:

> ART. 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge-advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained.

Appellant takes the position that the provisions of this statute were intended not only to safeguard the rights of commissioned officers and bring them face to face with their accusing witnesses, but were also enacted for the benefit of the naval service, and that appellant therefore had no authority to waive the benefit of the statute. While it may be conceded that article 60, as a whole, was intended for the benefit both of the Government and certain of such persons as should properly be brought to trial before courts-martial, this fact does not prevent the Government, through the Secretary of the Navy, and the appellant from entering upon an agreement waiving its mutual benefits in the trial of the case. There can, however, be no question that the provision against the use of the evidence produced before courts of inquiry in cases on trial before courts-martial involving capital punishment or the dismissal of commissioned or warrant officers was intended for the sole benefit of officers and enlisted men tried upon charges involving capital punishment and commissioned and warrant officers tried upon charges involving dismissal from the service. In this case article 60 might have been invoked for the protection of the appellant, but could not in any particular have been taken advantage of by the Government.

Upon the right to waive the benefits of a statute enacted for the protection of any class of citizens this court, in the case of *Shutte* v. *Thompson* (15 Wall., 159), has laid down the law with great clearness:

> It is to be observed that the objections made are all formal rather than substantial. Still

they are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect. But it is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for taking the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.

Appellant went to trial, represented by counsel, and made no objection whatever to the evidence pro-

duced at the court-martial. On the contrary, his counsel, in their brief submitted to the Secretary of the Navy in support of his request for a court-martial to investigate the adverse findings of the court of inquiry, expressed great satisfaction with the evidence produced before that court, and said (Rec., p. 11):

> It is evident from the large number of witnesses and the thoroughness of examination that it would be scarcely possible to have more evidence adduced before a court-martial than was presented to the court of inquiry.
>
> No court-martial or other military or civil tribunal could have been or could be more successful in eliciting all the facts bearing upon Commander Mullan's conduct.

Furthermore, it has been decided that—

> A person may by his acts or omission to act waive a right which he might otherwise have under the Constitution of the United States as well as under a statute. (*Pearce* v. *Somerset Ry.*, 171 U. S., 641–648; *Leonard* v. *Vicksburg, etc., R. R. Co.*, 198 U. S., 422, and authorities there cited.)

Moreover, it has been frequently held by this court that a prisoner may waive the constitutional privileges and benefits accruing to him and take the stand in his own behalf. (*Fitspatrick* v. *U. S.*, 178 U. S., 304; *Sawyer* v. *U. S.*, 102 U. S., 165.)

In the case of *Bishop* v. *United States* (197 U. S., 340) Mr. Justice Brown said:

> As the accused when arraigned said he had no objection to any member of the court

> and knew of no reason why the court should not proceed with his trial, it is manifestly too late to raise the objection in view of our decision in *Mullan* v. *United States*. (140 U. S., 240.) * * * His expressed satisfaction with the court as constituted was a clear waiver of any objection to its personnel.

In the case of *Schick* v. *United States*, where proceedings were instituted against appellant by way of criminal information to impose the penalty provided for violation of section 11 of what is known as the oleomargarine act, the parties in writing waived a jury and agreed to submit the issues to the court. The question was afterwards raised as to the right of waiver of trial by jury, and Mr. Justice Brewer, speaking for the court, said:

> We entertain no doubt that the parties could rightfully make such waiver and that the judgments are in no way invalidated thereby.

And in commenting further the learned justice said:

> Article 6 of the amendments, as we have seen, gives the accused the right of a trial by jury. But the same article gives him the further right to be confronted with the witnesses against him and to have the assistance of counsel. Is it possible that the accused can not admit and be bounded by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional nor statutory mandate, and no

public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy. (195 U. S., 71–72, and authorities there cited.)

(See also *Tombs* v. *Rochester and Syracuse R. R. Co.*, 18 Barber (N. Y.), 585; *Phyfe* v. *Eimer*, 45 N. Y., 104; *White* v. *Conn. Mut. L. Ins. Co.*, 4 Dill., 183; *Beecher* v. *Marquette, etc., Rolling Mills*, 45 Mich., 108.)

Appellant had the full benefit of the testimony before the court of inquiry. He was confronted by the witnesses; he was represented by counsel; he understood the nature and force of the testimony given by such witnesses; he was fully cognizant and informed as to his rights in the premises. When he agreed that the same evidence should be introduced in the court-martial proceedings he knew exactly the nature and character of the evidence to be considered by the court.

The proceedings were held at appellant's request. He raised no objection at the time of his trial before the court-martial to the waiver which he had voluntarily made as to the introduction of the testimony given by the witnesses at the court of inquiry.

It is too late now and was too late in the Court of Claims for him to introduce his objections to the nature of the testimony considered by the court-martial. He voluntarily and expressly waived his rights in writing to be confronted by the witnesses and again waived such rights by his silence at the court-martial proceedings.

ARTICLE 54 OF SECTION 1624, REVISED STATUTES, HAS NO APPLICATION TO THE PRESIDENT.

The sentence of the court-martial dismissing appellant from the United States Navy was approved by the Secretary of the Navy on June 30, 1897, and submitted to the President, who thereupon issued the following order:

> EXECUTIVE MANSION, *July 8, 1897.*
>
> The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank so that his name shall be placed at the foot of the list of commanders in the navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list.
>
> WILLIAM MCKINLEY.

Article 54 of section 1624 of the Revised Statutes provides:

> Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm.

The contention is made that the act of the President in reducing appellant to the foot of the list of commanders and suspending him from rank and duty on half pay was in *commutation* and not in *mitigation* of the sentence of the court-martial, and therefore illegal.

The Court of Claims in its opinion said:

> Granting *arguendo* without deciding the correctness of the position taken, we are of the opinion that the statute in question has no application to the President.
>
> The court-martial having been legally constituted and having had jurisdiction of the subject-matter charged and the person of the accused, and its proceedings and sentence having complied with all statutory regulations governing the same, the petition herein will be dismissed.

This position is strongly supported by the decision of this court in the case of *Ex parte Garland* (4 Wall., 333–399), where it was held:

> The power of pardon conferred by the Constitution upon the President is unlimited except in cases of impeachment. It extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken or during their pendency, or after conviction and judgment. *The power is not subject to legislative control.*

While the President, when he reviews and confirms the sentence of a general court-martial, exercises certain functions of executive authority conferred upon him in his constitutional capacity as Commander in Chief of the Navy, and expressly by certain statutes which make, for example, dismissal dependent upon his action, the fact that he possesses these constitutional and statutory powers does not operate to deprive him of another and distinct function, vested

in him, not as Commander in Chief of the Navy, but as Chief Executive of the nation and the possessor of the pardoning power, inherited as part of the royal prerogative. He may act at the same time in the exercise of both authorities. He may approve a sentence, under the first-mentioned branch of his authority, and then, having confirmed the sentence, he may, in the exercise of his pardoning power, immediately, as Chief Executive, remit or mitigate, in whole or in part, absolutely or conditionally, the penalties imposed by the sentence of the court-martial. The officer under sentence is not compelled to accept a conditional pardon; if he does, however, he accepts it with any ordinary, usual, or appropriate conditions imposed by the President in the exercise of his pardoning power.

It has already been stated that there may be annexed to a pardon any condition which is not immoral, illegal, or impossible of performance. (Am. and Eng. Enc. of Law, second ed., p. 580.)

Where a conditional pardon has been granted and accepted, and the convict has fulfilled the conditions thereof, the effect of the pardon becomes the same as though it were by its terms full and absolute. (Id., 595.)

In the case of *Lee* v. *Murphy*, the Supreme Court of Appeals of Virginia held:

> Though the warrant of a governor speaks as mitigating the punishment, yet as it substitutes a less for a greater punishment, and is intended to be done, and is done, with the con-

sent of the prisoner, it will be considered a pardon, and not a commutation of punishment. (22 Gratt, 789–813.)

Appellant, in this case, having taken advantage of the executive clemency, is not now in a position to complain that the President was too lenient in his action, or that the executive power had no authority to modify the sentence of dismissal. Appellant enjoyed all the fruits and advantages of executive clemency. He did not hesitate to accept the salary or honorarium attached to his reduced rank while he was at the foot of the list of commanders in the navy, and while suspended from rank and duty under the sentence as mitigated by the President. We therefore contend that he is now estopped from denying the validity of the President's action in mitigating the sentence.

THE SENTENCE AS CHANGED STRICTLY IN ACCORDANCE WITH THE LAW.

In addition to our contention that article 54 of section 1624, Revised Statutes, has no application to the President, we further insist that the position taken by appellant, as to the power of the President, has no foundation in law. The jurisdiction of the Court of Claims extends only to claims against the United States involving money alleged to be due to some one named in the petition as the claimant.

In the case at bar the loss of pay, upon which the claim is founded, arose not out of the appellant's reduction in numbers, but out of his *suspension* from

active duty; therefore the question for the court to determine is whether appellant's suspension was *in mitigation* or *in commutation* of his sentence of dismissal by the court-martial.

This court, in the case of the *United States* v. *Murray* (100 U. S., 537), a suit for pay by a clerk in the Treasury Department who had been granted leave of absence without pay for five months, said:

> To our minds it is clear the judgment below was wrong. While under the regulations of the department an employee is not entitled to a leave of absence with pay for more than thirty days in any one year, there is nothing to prevent the Secretary from putting him on furlough without pay at any time, if the exigencies of the service require it. He may be dismissed absolutely, and it is difficult to see why, if this can be done, he may not be furloughed without pay, which is in effect a partial dismissal. If he desires to be free from all obligations to serve in the future, he may resign; but if he permits his name to continue on the rolls, it must be on such terms as are imposed by the department. In this case an extraordinary demand for clerical service caused an early partial exhaustion of the appropriation for the year, and it became necessary to dispense with a part of the force, so as to reduce the expenses of the office. Absolute dismissals were not made, but, as a favor to the clerks, their names were kept on the rolls without pay. Murray remonstrated against what was done, but seems to have preferred the furlough to an absolute discharge. Under these

> circumstances, having rendered no service, he can not claim compensation.

The Court of Claims in the case of *Stillings* v. *The United States* (42 C. Cls., 61), where a pilot was suspended from duty without pay, speaking of the case of the *United States* v. *Murray, supra,* said:

> In *United States* v. *Murray* (100 U. S. R., 536) it was held by the Supreme Court that there was nothing to prevent the Secretary of the Treasury from putting an employee on furlough without pay at any time where the exigencies of the service required it; that if an employee might be dismissed absolutely it was difficult to see why such employee might not be furloughed without pay, that being in effect a partial dismissal.

The word "commutation," from the Latin *commutare,* meaning to exchange with, is defined as "putting one thing for another; substitution." Commutation of punishment is "the change of one punishment known to the law for another and different punishment also known to the law." (*Ex parte Janes,* 1 Nev., 321.)

"Mitigation" is defined as "lessening the degree of; diminution as to the severity of; reduction of the amount of; as, of damages, punishment, or penalty." (Anderson Law Dictionary.)

Therefore, it follows that if a suspension or furlough has been held by the courts to be "a partial dismissal," then both may very properly be considered as in *mitigation* and not in *commutation* of a sentence of dismissal.

We are not concerned as to why the President fixed upon one-half sea pay as the pay of the claimant while suspended from active duty. It was no doubt in consideration of the fact that section 1588 of the Revised Statutes provides that—

> The pay of all other officers on the retired list shall, when not on active duty, be equal to one-half the sea pay provided by this chapter for the grade or rank held by them, respectively, at the time of their retirement.

In the exercise of executive clemency so graciously extended to appellant, the President gave him the benefit of the same compensation as fixed by section 1588, Revised Statutes, for certain officers on the retired list whose records are not stained by findings of a court of inquiry and judgment of court-martial, as is the record of the officer in this case.

It is not contended that the President had not the right to approve the sentence of the court-martial dismissing appellant without pay, and if he had such right, he certainly had the power and the prerogative to suspend this officer upon one-half sea pay, as was done in mitigation of the sentence under court-martial proceedings.

HAD THE COURT OF CLAIMS JURISDICTION?

The Court of Claims can in no sense be termed an appellate court. It has no authority to review or consider the action taken by any other court. It is, in fact, a court of original jurisdiction, and can act only where there is a claim alleged to be due to some person from the United States. It has no authority

to correct mistakes of other tribunals. Therefore, even though evidence had been improperly admitted at the trial by the court-martial, the court below could not review or correct the action of that court.

> Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they were legally constituted and had jurisdiction of the offense charged, the person of the accused, and complied with the statutory regulations governing their proceedings. (*Dynes* v. *Hoover*, 20 How., 65; *Ex parte Reed*, 100 U. S., 13; *Smith* v. *Whitney*, 116 U. S., 167; *Johnson* v. *Sayre*, 158 U. S., 109; *Swaine* v. *United States*, 165 U. S., 553; *Carter* v. *McClaughry*, 103 U. S., 365; *McClaughry* v. *Deming*, 106 U. S., 49; Op. C. C., Rec., p. 14.)

Even if the Court of Claims had appellate jurisdiction of the case, the fact that the attorneys for appellant offered no objection either to the jurisdiction of the court-martial or to the admission of the evidence produced before it at the trial would prevent appellant from now taking advantage of that want of jurisdiction; nor could the sentence of the court-martial be attacked collaterally in that court.

> While, of course, a judgment may be directly attacked for errors or irregularities, this can only be done in a direct proceeding either before the same court to set it aside or in an appellate court; if a court has jurisdiction it is altogether immaterial, where its judgment is collaterally called in question, how grossly

irregular or manifestly erroneous its proceedings and decisions may have been. (Am. and Eng. Enc. of L., 2d ed., vol. 17, p. 1042.)

The fact that an erroneous or wrong judgment is rendered does not render the judgment void; while it may be reversed by a proper proceeding in the cause, it can not be attacked collaterally. (Id., p. 1072.)

In doubtful cases, as the safer course, the courts are inclined to treat defects as errors or irregularities rather than jurisdictional defects. (Id., p. 1066.)

This court said in the case of *McClaughry* v. *Deming* (186 U. S., p. 69):

> The question we are now discussing resolves itself into one of jurisdiction simply. If the court-martial had jurisdiction over the subject-matter of the charge against the defendant and of the person, or if the consent of the defendant gave such jurisdiction, the writ of habeas corpus will afford no relief, for generally, in such case, any error committed by a court-martial regularly organized and with full jurisdiction is not assailable before the civil courts. (*Swaim* v. *United States*, 165 U. S., 553; *Carter* v. *McClaughry*, 183 U. S., 365.)

This language is directly applicable to the case at bar, as the court-martial had full and complete jurisdiction of both the person of the defendant and the subject-matter of the charge against him; and this jurisdiction was further fortified by the consent of the defendant to his trial upon the terms proposed by the Secretary of the Navy.

We respectfully cite the very able and comprehensive opinion of the court below, as delivered by Judge Booth. (Record, pp. 14–19, inclusive.) The whole subject-matter is treated with such clearness that little may be added to the forcible reasoning therein.

We believe that appellant has no just cause of complaint as to the legality and regularity of the proceedings of the court-martial before which he was tried. He is not here contending that the executive power did not extend to him that mercy or leniency which the law recognizes the President may extend in the exercise of his discretion. On the other hand, in plain words, appellant says that the President should have stopped at confirming the sentence of the court-martial dishonorably discharging him from the Navy of the United States without pay; or that he should have set the whole proceedings aside and permitted appellant to act in bad faith with the Secretary of the Navy, and treat as a mere bagatelle a solemn agreement entered into by him with full cognizance of his rights and privileges in the premises.

We submit that no error is found in the proceedings of the court below, and therefore ask that the judgment be affirmed.

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